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No. 92-382

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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VICTOR ARDITTI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner was entrapped as a matter of law as a result of the undercover investigation that led to his prosecution for conspiracy and money laundering.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 11 |
| Conclusion | 16 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Jacobson* v. *United States*, 112 S. Ct. 1535 (1992) | 11, 13, 14 |
| *Sherman* v. *United States*, 356 U.S. 369 (1958) | 15-16 |
| *Sorrells* v. *United States*, 287 U.S. 435 (1932) | 12 |
| *United States* v. *Akinseye*, 802 F.2d 740 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987) | 13 |
| *United States* v. *Collins*, 957 F.2d 72 (2d Cir.), cert. denied, 112 S. Ct. 2285 (1992) | 13 |
| *United States* v. *Ford*, 918 F.2d 1343 (8th Cir. 1990) | 13 |
| *United States* v. *Johnson*, 872 F.2d 612 (5th Cir. 1989) | 13 |
| *United States* v. *Nations*, 764 F.2d 1073 (5th Cir. 1985) | 13 |


Statutes:


| | |
|---|---|
| 18 U.S.C. 371 | 2 |
| 18 U.S.C. 1956(a)(3) | 2 |


Miscellaneous:


| | |
|---|---|
| *Fifth Circuit Pattern Jury Instructions* (West 1990) | 14 |

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-38, is reported at 955 F.2d 331. The order of the district court, Pet. App. 40-43, denying petitioner's post-verdict motion for a judgment of acquittal is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. A petition for rehearing was denied on June 2, 1992. Pet. App. 39. The petition for a writ of certiorari was filed on August 31, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to avoid filing currency transaction reports and to launder a monetary instrument, in violation of 18 U.S.C. 371, and five counts of money laundering, in violation of 18 U.S.C. 1956(a)(3). He was sentenced to a prison term of 18 months, to be followed by three years' supervised release. He was also ordered to pay a fine of $10,000. The court of appeals affirmed. Pet. App. 1-38.

1. In 1988, IRS Agent Gary Gallman began an undercover investigation of money laundering in El Paso, Texas. Gallman had information that Gabriel Yanez, who owned a money exchange business, was laundering money. Using the name "Gary W. Adams," Gallman posed as a cocaine dealer and contacted Yanez. Gallman intimated to Yanez that Gallman and his associates were involved in illegal activity. Gallman told Yanez that he wanted Yanez's help in moving large amounts of cash "off-shore" and in returning it to the United States in usable form. Yanez arranged for Gallman to open a bank account in Mexico under the name "Ricardo Guerra-Battle." Yanez twice funneled $100,000 in cash through Mexico, arranged for the money to be wire-transferred to Gallman's bank account in Dallas, and then collected a fee from Gallman. Pet App. 2-3; Gov't C.A. Br. 3-8.

Yanez next tried to help Gallman open a bank account in the Cayman Islands by using a letter of introduction from a commercial lawyer in El Paso to a Cayman Islands attorney. When Yanez learned that

the account could not be opened in the name of an individual, he suggested that Gallman form a corporation for that purpose in the British Virgin Islands. Gallman agreed that Yanez should have the necessary documents prepared. Gallman later asked Yanez to recommend an attorney who could handle their financial transactions. Yanez mentioned that petitioner, an El Paso criminal defense lawyer, had handled several cases involving deposits. Pet. App. 3; Gov't C.A. Br. 9-10.

On September 21, 1988, Yanez introduced Gallman to petitioner.[1] Yanez said that he had told petitioner about the two prior laundering transactions. When petitioner asked Gallman the nature of his business, Gallman replied that he would have to trust petitioner before revealing that information. Gallman identified several drug dealers with whom he claimed to have been involved, and he explained that Yanez was helping him "get [his money] out and get it back" so that he could use it. Petitioner reassured Gallman by mentioning the attorney-client privilege, his previous work with clients involved in drugs, and his distrustful nature. Petitioner also told Gallman that because Gallman was "into that kind of business," he should fund a war chest in preparation for the day that he would need money to get out of jail on bond and hire a lawyer. Gallman replied that he could not spend any of the money "the way it is right now" and that he had "to get it out and get it back." When petitioner told Gallman that he could not advise him on how to

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[1] All meetings between petitioner and Agent Gallman were videotaped. Gov't C.A. Br. 39.

launder illegal funds, Gallman responded that Yanez was doing that for him and that one of the reasons he wanted to go off-shore was to keep people from asking questions. Gallman said that he wanted to spend $200,000 to $300,000 in cash on houses "here and there," and petitioner advised him on structuring real estate transactions so as to avoid arousing suspicion. In particular, petitioner recommended that Gallman avoid cash purchases and bypass the banking system with owner financing. Petitioner added that if Gallman used his services, the government would not discover Gallman's payments to him. Pet. App. 3-4; Gov't C.A. Br. 10-14.

In petitioner's presence, Yanez told Gallman that the corporation they had previously discussed had been set up in the British West Indies. Gallman then signed the documents authorizing the opening of the Cayman Islands bank account both in his undercover name and in the name "Ricardo Guerra." Gallman said that he would return in October. Pet. App. 14; Gov't C.A. Br. 14.

In October, Yanez channeled another $100,000 of Gallman's cash to Gallman's Dallas account. At a meeting about the transfer, Gallman told Yanez that he and his group were "in the 'coke business,' " that he was responsible for handling the money derived from the sales, and that he had several million dollars with which he wanted to buy houses and invest in the stock market. The two agreed to follow petitioner's advice about avoiding cash purchases of property; they decided to use Mexican cashier's checks instead, and to make all purchases in the corporate name to protect Gallman's identity. With respect to the

lawyers helping them, Yanez said that he hesitated to let the commercial lawyer know about the source of Gallman's money because that lawyer was "straight." Yanez said that petitioner had agreed to assist Gallman but would not take a retainer from him because of the risk that the government would confiscate Gallman's money. Yanez reiterated that petitioner wanted Gallman to maintain a war chest in Mexico for contingencies. Pet. App. 4; Gov't C.A. Br. 14-16.

On March 30, 1989, at Gallman's request, Yanez invited petitioner to meet them for lunch. The three discussed methods of keeping money from being traced. Noting that large depositors are required to furnish information about themselves, petitioner said that smaller deposits are safest. Petitioner suggested that Gallman transact his business through checks or wire transfers, and that he make the standard down-payment on anything he bought and pay the rest in installments. Pet. App. 7; Gov't C.A. Br. 18-20.

Gallman offered petitioner the chance to "walk away from the deal" if petitioner had a "problem with the money or with what I do." When petitioner responded that he had not asked what kind of business Gallman was involved in, Gallman said, "You understand this is coke money," to which petitioner replied, "You don't see me going anywhere, do you?" At the end of the meeting, petitioner confirmed that he had "no qualms, no qualms at all." Pet. App. 7; Gov't C.A. Br. 20.

On May 2, Gallman again met with petitioner and Yanez. Gallman mentioned that he had an opportunity

to invest $200,000 in an Oklahoma oil deal. Gallman revealed that "this money we're doing right now is part of a ten-kilo deal that * * * I'm getting paid off for * * * now," and stressed the need to conceal his involvement in the oil deal. Petitioner outlined a complex arrangement for preventing the government from learning Gallman's identity, including the use of a foreign corporation as the investor, the creation of a group of corporations through which the money could be transferred, and the setting up of a trust in a foreign bank to receive and invest the money. Pet. App. 7-8; Gov't C.A. Br. 21-22.

Gallman repeated that "this is coke money" and wanted to know whether he could count on petitioner not to talk if "I end up * * * getting busted." Petitioner assured Gallman that he would not divulge anything but again warned Gallman against spending large amounts of cash. Petitioner agreed to draft documents memorializing a "loan" of money from the foreign corporation to Gallman, which would explain the source of Gallman's money, and to check on establishing an escrow account to receive Gallman's money and invest it in the Oklahoma deal. Pet. App. 8; Gov't C.A. Br. 23.

The next week, Yanez told Gallman that the preparation of the fake loan documents and the opening of the escrow account would be delayed because petitioner was being audited by the IRS. Yanez added that petitioner was having trouble opening the escrow account because the bank insisted on knowing the identities of the parties to the transaction and the purpose of the account. Yanez reported that petitioner had expressed concern about

"being framed" by Gallman. When Yanez offered to ask the commercial lawyer to handle the matter, Gallman said that he was uncomfortable with that and wanted to use petitioner because "he knows the score." Pet. App. 8; Gov't C.A. Br. 25-26.

At the end of May, Gallman delivered $50,000 to Yanez, who in turn funneled it to Gallman's Dallas account. Yanez attributed petitioner's delay in implementing their arrangements to procrastination and to the press of other business. Yanez added, however, that petitioner had told him just a few days earlier that he had researched the escrow issue and was "convinced" about how to proceed with the bank in setting up the account. Gallman telephoned Yanez a number of times over the next few weeks, asking him to have petitioner complete the deal. Yanez insisted that petitioner had no problem with participating in the venture but explained that petitioner wanted to be careful in structuring the transaction. Pet. App. 8-9; Gov't C.A. Br. 26-28.

The first infusion of funds to Oklahoma occurred through Yanez's own bank account at the end of June, not through the escrow account as originally planned. At a meeting in mid-July, petitioner explained to Gallman that he and Yanez had chosen that method of transfer because of the complications involved in establishing the escrow account. Petitioner offered to set up a trust for Gallman and manage its funds, an arrangement that would allow him to move money in and out of the account on Gallman's instructions while preserving Gallman's anonymity. The three formulated an elaborate plan to funnel money from the foreign corporate account through Mexico and into

the trust account without having to report the transactions. They then completed the arrangements for the fraudulent loan from "Guerra" to Gallman. Pet. App. 9; Gov't C.A. Br. 28-30.

Several days later, petitioner opened an account in the name "V.R. Arditti Trust Account Number 3." No trust documents were prepared for the account, and petitioner alone had signature authority and the code to validate wire transfers. When petitioner received a check for $50,000 from the corporate account on August 2, he deposited it into the trust account and instructed the bank to wire $49,000 to the oil deal bank account in Oklahoma. Pet. App. 9-10; Gov't C.A. Br. 32.

On August 8, petitioner presented Gallman with a $5,000 bill for his services and said that in the future he would charge a fee of three percent of the money he moved into and out of the trust account plus legal fees. When Gallman protested the size of the transfer fee, petitioner reduced it to two percent. Petitioner asked Gallman not to pay him in cash in order to avoid arousing suspicion. The three then devised a more efficient plan for future laundering transactions, focusing on the need to shield Gallman's identity by using the name "Guerra" and by procuring the funds for deposit in the trust account at a Mexican bank in the form of a cashier's check. Pet. App. 10; Gov't C.A. Br. 32-35.

As planned, petitioner received a check for $50,000 the next day from a Mexican money exchanger, deposited it into the trust account, and transferred the money to the oil deal account five days later. On August 29, petitioner followed the same procedure

with another $50,000. Pet. App. 10; Gov't C.A. Br. 35-36. The undercover operation was subsequently terminated, and petitioner and Yanez were indicted.

2. Petitioner raised an entrapment defense at trial but was convicted. After trial, he moved for a post-verdict judgment of acquittal on the ground that he had been entrapped as a matter of law. The district court denied the motion. Pet. App. 40-43. The court observed, first, that "[i]f a defendant properly raises the defense of entrapment, as [petitioner] did in this case, the government has the burden of proving beyond a reasonable doubt that he was predisposed to commit the crime charged." *Id.* at 42. The district court noted that it was obliged to assess the evidence of predisposition "in the light most favorable to the government," and that it was "not authorized to find entrapment as a matter of law unless it conclude[d] that no reasonable jury could have found that the defendant was predisposed to commit the offense." *Ibid.*

Applying these principles to the facts of this case, the district court concluded that

> a reasonable jury could have found from all the evidence that [petitioner] was predisposed to commit the offenses charged. The jury could have viewed the testimony of the Government's undercover agent and especially the videotape recordings of [petitioner's] conversations with the undercover agent as showing him to be a willing and active participant in the scheme.

Pet. App. 42-43.

3. The court of appeals affirmed. Pet. App. 1-38. The court noted that the entrapment defense involves

"two factors: (1) government inducement; and (2) the defendant's predisposition, before contact with government agents, to commit the crime charged." The court then explained that entrapment is established as a matter of law "only where a reasonable jury could not find that the government discharged its burden of proving the defendant was predisposed to commit the charged crime." *Id.* at 25. With respect to burdens of proof, the court stated:

> Once a defendant makes a prima facie showing of entrapment by presenting "some evidence that government conduct created a substantial risk that an offense would be committed by a person other than one ready to commit it," the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime and, thus, [was] not entrapped.

*Id.* at 25-26. The court acknowledged that on appeal from a conviction in which the jury has rejected the entrapment defense, the standard of review is whether, "viewing reasonable inferences and credibility choices in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." *Id.* at 26.

Under these principles, the court held, petitioner's post-verdict motion for a judgment of acquittal was properly denied. The court noted that "there was no overwhelming evidence of serious resistance by [petitioner]," Pet. App. 26 (internal quotation marks omitted), and that "[a] jury could view [Agent] Gallman's testimony and the tape recordings and

video recordings of [petitioner] as proof that [petitioner] was an eager, active participant in money laundering," *id*. at 27 (internal quotation marks omitted). The court pointed out that after Agent Gallman told petitioner that the money for the proposed real estate investment was "coke money" and that petitioner could just walk away if he did not want to be involved in such a deal, petitioner replied, "You don't see me going anywhere." *Ibid.* The court added that although petitioner did not initially seek out the government agent, petitioner responded to the opportunity that the agent offered him by "jump[ing] in with both feet, helping Gallman formulate plans to launder the 'drug' money and advising him on ways to avoid arousing governmental suspicion." *Ibid.* (internal quotation marks omitted); see also *id.* at 29. Accordingly, the court concluded that "a reasonable jury could have found beyond a reasonable doubt that [petitioner] was predisposed to money laundering and thus was not entrapped." *Id.* at 26.[2]

**ARGUMENT**

Petitioner contends (Pet. 12-21) that under the concept of predisposition articulated in *Jacobson* v. *United States*, 112 S. Ct. 1535 (1992), he was entrapped as a matter of law. Petitioner is incorrect. The *Jacobson* Court's understanding of predisposition

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[2] The court of appeals also rejected petitioner's claims that the government's investigation of him was outrageous and violative of due process, Pet. App. 28-31, that the district court's instructions on entrapment were inadequate, *id.* at 23-25, and that the district court improperly quashed his subpoena for IRS documents, *id.* at 31-34. Petitioner does not renew those claims in this Court.

does not differ from that of the court of appeals. Accordingly, review by this Court is not warranted.

*Jacobson* involved a sting operation in which the government repeatedly contacted the defendant over a two-and-a-half year period through various fictitious organizations and a bogus pen pal before the defendant accepted an invitation to purchase child pornography through the mail. Relying on the well-settled proposition that "[g]overnment agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute," 112 S. Ct. at 1540 (citing *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932)), the Court concluded that the defendant had been entrapped as a matter of law into ordering the prohibited material. The Court reasoned that the government's prior contacts with the defendant "not only excited [his] interest in sexually explicit materials banned by law but also exerted substantial pressure on [him] to obtain and read such material as part of a fight against censorship and the infringement of individual rights." *Id.* at 1542. In those circumstances, the Court held, "[r]ational jurors could not say beyond a reasonable doubt that [the defendant] possessed the requisite predisposition [to commit the offense charged] prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to [him]." *Id.* at 1543.

Like the *Jacobson* Court, the court of appeals in this case focused on whether petitioner was predisposed to commit the crimes charged independent of the government's conduct. See Pet. App. 25 (focus of

entrapment defense is "defendant's predisposition, before contact with government agents, to commit the crime charged.").[3] After viewing the evidence in the light most favorable to the government, as it was required to do, see *United States* v. *Collins*, 957 F.2d 72, 77 (2d Cir.), cert. denied, 112 S. Ct. 2285 (1992); *United States* v. *Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); *United States* v. *Ford*, 918 F.2d 1343, 1348 (8th Cir. 1990), the court specifically rejected petitioner's claim that "the government offered *no* evidence of predisposition *prior* to [petitioner's] involvement in the offense." Pet. App. 26 (internal quotation marks omitted). The court of appeals' conclusion finds ample support in the record. As the court correctly observed, petitioner "was brought into the money laundering plot by his co-conspirator, Yanez," not by Agent Gallman. *Id.* at 29. The jury was permitted to infer that Yanez, who indisputably was engaged in money laundering activities, sponsored petitioner's participation in Gallman's money laundering scheme because he knew from experience, or otherwise had reason to expect, that petitioner would be a willing and reliable ally in

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[3] The cases on which the court of appeals principally relied, Pet. App. 26-27, also applied this standard. See *United States* v. *Johnson*, 872 F.2d 612, 620-621 (5th Cir. 1989) (in determining whether defendant was entrapped as a matter of law, "[the] relevant focus is on [his] predisposition to commit the crime prior to any contact with the Government agents"); *United States* v. *Nations*, 764 F.2d 1073, 1079 (5th Cir. 1985) (court must focus on "the predisposition of the defendant, before contact with government agents, to commit the crime charged"). There is thus no merit to petitioner's contention, Pet. 21, that *Jacobson* "clearly overturns" those cases.

the illegal enterprise. Once Yanez tendered petitioner as a potential co-conspirator, Gallman merely provided petitioner with an opportunity to commit the crime, whereupon—as the court of appeals noted—petitioner "jumped in with both feet." *Id.* at 27.

Petitioner "actively participated in the criminal activity by formulating and carrying out investment plans" for Gallman, Pet. App. 29, even though Gallman had warned him that the money was "coke money" and had assured him that he was free to walk away from the deal if he was uncomfortable with it, *id.* at 27. The court thus properly determined that "a reasonable jury could have found beyond a reasonable doubt that [petitioner] was predisposed to money laundering and thus was not entrapped." *Id.* at 26.[4]

In *Jacobson*, the Court reaffirmed the longstanding principle that a prosecution will not be defeated when government agents "merely afford opportunities or facilities for the commission of the offense," and that

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[4] The jury instructions ensured that petitioner could be convicted only on the basis of predisposition that existed independent of the government's acts. As the court of appeals noted, the instructions paralleled *Fifth Circuit Pattern Jury Instructions* § 1.28, at 40 (West 1990) and provided in pertinent part that:

> [I]f the evidence in the case should leave you with a reasonable doubt whether the defendant[] had the previous intent or purpose to commit an offense of the character charged apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty. * * * The burden is on the government to prove beyond a reasonable doubt that the defendant[] [was] not entrapped.

Pet. App. 23; Gov't C.A. Br. 46.

"[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." 112 S. Ct. at 1540. The Court explained:

> Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition. See *United States* v. *Sherman*, 200 F.2d 880, 882 (CA2 1952). Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner * * * had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. *Mathews* v. *United States*, 485 U.S. 58, 66 * * * (1988).

112 S. Ct. at 1541. In this case, Agent Gallman simply offered petitioner an opportunity to participate in a criminal venture for which petitioner's co-conspirator Yanez had recommended him. Petitioner's ready acceptance of that opportunity in exchange for legal fees and, later, for a percentage of the money laundered through the trust that he set up in his own name for that purpose demonstrate that he was an "unwary criminal," not an "unwary innocent," see *id.* at 1537 (quoting *Sherman* v. *United States*, 356 U.S.

369, 372 (1958)), and that he was therefore not entrapped as a matter of law.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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